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In the Supreme Court of the United States

OCTOBER TERM, 1977

JOSEPH EDWARD KILRAIN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A11) is reported at 566 F. 2d 979.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 1978 (Pet. App. A12). A petition for rehearing was denied on February 24, 1978 (Pet. App. A13), and the petition for a writ of certiorari was filed on March 21, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the presence at trial of a co-defendant who had cooperated briefly with the government prior to trial and who pleaded guilty after two days of trial deprived petitioners of their Sixth Amendment right to counsel.

2. Whether the prosecutor's failure to disclose in a bill of particulars every overt act later offered in evidence to prove a conspiracy denied petitioners a fair trial.

3. Whether the evidence showed multiple conspiracies.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Georgia, all petitioners were convicted of conspiracy to possess marijuana with intent to distribute, in violation of 21 U.S.C. 846. Petitioners Piper, Davis and Joseph Kilrain were also convicted of the substantive offense, in violation of 21 U.S.C. 841(a)(1).[1] Joseph Kilrain was sentenced to consecutive five-year terms of imprisonment, to be followed by two special parole terms of five years. Jack Kilrain was sentenced to five years' imprisonment, to be followed by a five-year special parole term. Piper was sentenced to two concurrent five-year terms of imprisonment, to be followed by a five-year special parole term, and Davis was sentenced to five years' probation. The court of appeals affirmed (Pet. App. A1-A12).

1. The evidence at trial showed that the petitioners, together with co-defendants William Barber and Barber's wife and with unindicted co-conspirator William Dart, operated a marijuana distribution network in Atlanta, Georgia. From January until July 1975, the conspirators made several trips to Texas to bring marijuana to Atlanta (Tr. 123-141, 540-542, 171-181, 544-552, 562-563, 603-607, 203-211, 219).[2] In July 1975, Dart provided information about the operation to DEA agents, who obtained a search warrant and seized the marijuana (Tr. 217-218, 220, 501-505). Petitioner Piper was arrested immediately, and the arrest of the other petitioners followed.

2. Co-defendant Barber was arrested in September 1975 and shortly thereafter approached DEA Agent Balazs and offered to become an informant (Pet. App. A5; Tr. 451-452, 576). Barber informed Balazs that Joseph Kilrain would be in Texas in November to purchase marijuana, and Barber arranged for undercover DEA agents to be present (Pet. App. A5; Tr. 456-457, 459, 581-583). At the meeting, the pending case against Barber and Joseph Kilrain was discussed, and Kilrain said he wanted the DEA informant killed (Pet. App. A5).

Barber stopped cooperating with the government shortly afterwards and went to trial with his co-defendants. After the second day of trial, Barber contacted the prosecutor and agreed to plead guilty and testify for the government; in exchange, the indictment against his wife and son was dismissed (Pet. App. A5; Tr. 435-436, 538-540). Barber testified about his role in supplying and delivering marijuana to the other petitioners (Tr. 540-542, 544-553, 560-561, 597-601), but neither he nor any other witness testified as to any of the discussions at the November 1975 meeting attended by Joseph Kilrain and the undercover agents (Pet. App. A5-A6; R. 1037-1043).

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[1]Co-defendant Barber pleaded guilty during trial. At the close of the evidence, the court entered a judgment of acquittal as to co-defendant Seibert.

[2]"Tr." refers to the transcript of the trial, in four volumes, and "R." to the record on appeal.

ARGUMENT

1. Petitioners contend (Pet. 10-13) that their Sixth Amendment rights to counsel were "wrongfully compromised" (Pet. 13) when Barber testified as a government witness. The claim appears to be twofold. First, petitioners contend (Pet. 13) that Barber's presence with undercover DEA agents at the November 1975 meeting with Kilrain violated the principle that an indicted defendant "has a right to legal representation when the government interrogates him" (*ibid.*). See *Massiah* v. *United States*, 377 U.S. 201; *Brewer* v. *Williams*, 430 U.S. 387. Second, petitioners claim that Barber's presence at "strategy discussions" with petitioners' defense counsel in the two days of trial before Barber decided to plead guilty violated their right to counsel. See *Weatherford* v. *Bursey*, 429 U.S. 545, 550-559. Both contentions are insubstantial.

a. Petitioners' claim under *Massiah* and *Brewer* is without merit for, as the court of appeals found, "[t]he agents and the informant who conversed with Kilrain did not testify at the trial as to the substance of those discussions, and [petitioners] have not demonstrated that any of the prosecution's evidence was obtained as a result of the conversations with Kilrain" (Pet. App. A6). Petitioners do not dispute that finding (Pet. 13).

Massiah announced an evidentiary exclusionary rule only: a defendant's "incriminating statements, obtained by federal agents under the circumstances [there] disclosed, could not constitutionally be used by the prosecution as evidence against *him* at his trial." 377 U.S. at 207 (emphasis in original). On the other hand, the Court "accept[ed] and, at least for present purposes, completely approve[d]" the proposition that investigation of the defendant could continue even after he was indicted and had obtained counsel (*id.* at 206-207).

That is all that happened here. Even assuming that the November 1975 meeting took place under circumstances which would forbid the use of petitioner Kilrain's statements against him at trial, no such use occurred here. Nor, as the court of appeals found, did petitioners demonstrate that the meeting indirectly led to evidence against the petitioners. See *Brewer*, *supra*, 430 U.S. at 406-407 n. 12. There was thus no violation of petitioners' Sixth Amendment rights as a result of the November 1975 meeting.

b. Petitioners' claim that their rights to counsel were violated when Barber, who later testified for the government, took part in defense "strategy discussions" is equally misconceived. The claim depends upon petitioners' assertion that Barber was a government informant at the time of the "strategy discussions" (Pet. 11-12). Such an assertion, however, is contrary to the evidence, which showed that "Barber had ceased operating as a government informant well before trial began" (Pet. App. A7). This refutes any claim that the government violated petitioners' Sixth Amendment rights by planting an informer in attorney-client discussions.

Petitioners' claim is invalid for another reason. In *Weatherford*, this Court rejected the conclusion, reached by the court of appeals in that case, that "if an undercover agent meets with a criminal defendant who is awaiting trial and with his attorney and if the forthcoming trial is discussed without the agent revealing his identity, a violation of the defendant's constitutional rights has occurred * * *." 429 U.S. at 550. Rather, the Court found that no Sixth Amendment violation occurs where the informant does not testify at trial as to attorney-client conversations, does not provide the prosecution with information about defense strategy or leads to evidence, and does not otherwise use his presence at such

conversations "to the substantial detriment" of the defendant. *Id.* at 554.

There is no indication that Barber's presence at meetings with petitioners and their counsel produced such results here. Petitioners acknowledge as much, for they state that when Barber approached the prosecution in mid-trial to discuss a guilty plea, "[t]here is no way of knowing just how much of the conversations with co-defendants and their counsel was touched upon * * *" (Pet. 12-13). Petitioners state only that defense strategy "had to have been discussed" between Barber and the prosecution (Pet. 12). Because the evidence on appeal must be viewed in the light most favorable to the government, *Glasser* v. *United States*, 315 U.S. 60, 80, the court of appeals correctly rejected such speculation, and that conclusion does not merit further review by this Court.

Finally, even assuming that Barber did communicate something he gleaned from sitting at the defense table, petitioners have made no showing that it benefitted the prosecution or handicapped their defense. See, *e.g.*, *Klein* v. *Smith*, 559 F. 2d 189, 197 (C.A. 2); *Mastrian* v. *McManus*, 554 F. 2d 813, 821 (C.A. 8), certiorari denied, 433 U.S. 913.

2. Petitioners also argue (Pet. 6-9) that they were denied due process when the government failed to furnish them with a bill of particulars listing each overt act which was later introduced at trial in support of the conspiracy charge. The court below held that petitioners were not entitled to discover every overt act that the government intended to use in its case (Pet. App. A10). This ruling is correct and does not require further review.

It is settled that "[t]he Government need not, when charging conspiracy, set out with precision each and every act committed by the conspirators in the furtherance of

the conspiracy." *United States* v. *Cohen*, 518 F. 2d 727, 733 (C.A. 2), certiorari denied *sub nom. Duboff* v. *United States*, 423 U.S. 926; *Wong Tai* v. *United States*, 273 U.S. 77, 81; see also *United States* v. *Murray*, 527 F. 2d 401, 411 (C.A. 5). Moreover, overt acts not pleaded in the indictment may nonetheless be introduced at trial in proving a conspiracy. *United States* v. *Adamo*, 534 F. 2d 31, 38 (C.A. 3), certiorari denied *sub nom. Kearney* v. *United States*, 429 U.S. 841; *United States* v. *Perez*, 489 F. 2d 51, 70 (C.A. 5), certiorari denied, 417 U.S. 945. And while the purpose of a bill of particulars is to inform a defendant of the nature of the charges against him and to minimize surprise at trial, the bill is not to be used to "obtain a detailed disclosure of the government's evidence prior to trial." *United States* v. *Perez*, *supra*, 489 F. 2d at 71; see also *United States* v. *Armocida*, 515 F. 2d 49, 54 (C.A. 3), certiorari denied *sub nom. Gazal* v. *United States*, 423 U.S. 858. Indeed, even where the government fails to prove any overt act alleged, but proves an unalleged act as part of the proof of conspiracy, the conviction will stand. *E.g.*, *United States* v. *Adamo*, *supra*, 534 F. 2d at 38-39; *United States* v. *Fassoulis*, 445 F. 2d 13, 19 (C.A. 2), certiorari denied, 404 U.S. 858; *Brulay* v. *United States*, 383 F. 2d 345 (C.A. 9), certiorari denied, 389 U.S. 986; *United States* v. *Armone*, 363 F. 2d 385 (C.A. 2), certiorari denied, 385 U.S. 957. Finally, the prosecutor did furnish a bill of particulars listing numerous overt acts beginning in March 1975, in addition to those detailed in the indictment (R. 1019-1022).

Petitioners claim that a pre-trial order by the magistrate required the prosecution to furnish each and every overt act intended to be introduced into evidence (Pet. 6-7). However, the trial court refused to enforce this order (Tr. 118-119, 124-125, 129, 138-139, 143-144), and "[t]he

determination of whether to impose a specific sanction for violation of its own orders is * * * surely within the discretion of the ordinary court." *United States* v. *Mackey*, 551 F. 2d 967, 970 (C.A. 5). Petitioners have failed to demonstrate an abuse of the trial court's discretion.[4]

3. Petitioners contend (Pet. 9-10) that the introduction into evidence of overt acts not listed in the indictment or bill of particulars resulted in proof of multiple conspiracies. This contention is unfounded. The proof about which petitioners complain did not concern a different scheme but simply the formation of the conspiracy charged and the first acts in furtherance of it.

The conspiracy alleged in the indictment and described in the bill of particulars involved the delivery of marijuana from Texas to Atlanta, beginning at least in March 1975 and continuing through July 1975 (Pet. App. A15-A18; R. 1019-1022). The only evidence that predated this period was testimony by Dart, first about a December 1974 meeting with Piper and Joseph Kilrain when Dart was invited to join their marijuana business (Tr. 123-132) and, second, about a January 1975 transaction in which the three men acquired marijuana and arranged its delivery to Atlanta (Tr. 133-141). Rather than proving a separate conspiracy, this testimony demonstrated the background and structure of the charged conspiracy, with Joseph Kilrain at the head and the others in lesser positions. This evidence was minimal compared with the

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[4]Petitioners' claim (Pet. 7) that they were prejudiced by the statement in the bill of particulars that the conspiracy was in effect in March 1976 is without merit. This was an obvious typographical error, as recognized by the court below (Pet. App. A10), in light of other statements in the bill of particulars showing that the conspiracy existed in early 1975 (R. 1020-1021).

overwhelming proof of the operation from March to July. Finally, the trial court instructed the jury that a single conspiracy had to be proved (Tr. 778). Under these circumstances, there was no realistic possibility that the jury could have convicted petitioners for any offense other than the one charged. See, *e.g.*, *United States* v. *Butler*, 494 F. 2d 1246, 1255-1256 (C.A. 10); *United States* v. *Cruz*, 478 F. 2d 408, 413-414 (C.A. 5), certiorari denied *sub nom. Firentes* v. *United States*, 414 U.S. 910.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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